JOSEPH E. STEGER

IBLA 75-240 Decided May 8, 1975

Appeal from the November 21, 1974, decision of the Montana State Office, Bureau of Land Management, denying reinstatement of oil and gas lease M 26074-F.

Reversed.

1. Oil and Gas Leases: Reinstatement -- Oil and Gas Leases: Rentals -- Oil and Gas Leases: Termination

An oil and gas lease terminated by operation of law for failure to pay the annual rentals on time may be reinstated where the lessee's delay in making payment was due to his seeking clarification of an illegible notice of payment sent by the Bureau of Land Management, and his action demonstrates his reliance on the notice.

APPEARANCES: Joseph E. Steger, pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Joseph E. Steger appeals from the November 21, 1974, decision of the Montana State Office, Bureau of Land Management (BLM), which denied his petition for reinstatement of oil and gas lease M 26074-F. The annual rental payment was due on November 1, 1974; it was not received in the Montana State Office until November 8, 1974. Consequently, the Montana State Office held that the lease had automatically terminated by operation of law for failure to pay the annual rental on or before the anniversary date. 30 U.S.C. § 188(b) (1970); 43 CFR 3108.2-1(a).

Appellant received a courtesy billing notice from the BLM, which he returned on October 27 with a letter in which he complained that the notice was illegible. It was received by the Montana State

Office on October 31, where on that same day the illegible copy of the notice was repaired to make it legible and re-mailed to the lessee. Appellant asserts that he then mailed the payment on November 5, to the Montana State Office, where the record shows it was received on November 8.

[1] The pertinent statute and regulation, 30 U.S.C. § 188(b) (1970) and 43 CFR 3108.2-1(a), provide that a lease will terminate by operation of law if the annual rental payment is not received in the appropriate office on or before the anniversary date of the lease. One exception provided by 30 U.S.C. § 188(b) (1970) and 43 CFR 3108.2-1(b) is that a lease will not terminate if, before the anniversary date, payment is submitted which is deficient, but which corresponds to the amount in a courtesy billing sent by the BLM. The purpose of this exception is set forth in S. Rep. No. 91-205, 91st Cong., 1st Sess. 6 (1969):

> It provides that when the lessee pays on the due date an amount computed in accordance with the acreage figure stated in the lease or the sum stated in any bill or other such reminder sent to him by the Secretary and the acreage figure subsequently is determined to be incorrect, the lease will not automatically terminate unless the lessee fails to make up the deficiency within a period prescribed by the Secretary after notice. It does not matter whether the deficiency is nominal or substantial.
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> This provision was recommended by a representative of the California Co., Division of Chevron Oil Co. in testimony on the legislation before the Committee on Interior and Insular Affairs of the House of Representatives during the 90th Congress. He pointed out that the lessee should be able to rely on the acreage figure stated in his lease agreement and compute his payment from that figure. Also, the lessee should be able to rely on the sum stated in any bill or other such reminder of payment sent to the lessee by the Secretary. If he makes his payment relying on either of these and it is later shown that the figure or the bill was in error resulting in a deficiency, we believe that the lease should not terminate unless the lessee fails to make up the deficiency after notice. We believe that this approach is reasonable.

> We want to make it clear that the Department does not send out "bills" as such and have [sic] no obligation under law to do so. We do not construe the language in S. 1193 as changing this situation.

The clear purpose of the proviso, then, is to prevent the automatic termination of leases where the lessee has relied on an incorrect courtesy notice sent by the BLM.

While it is clear that appellant's lease terminated by operation of law since he did not actually make payment before the anniversary date, as required by statute, the lease may be reinstated under 30 U.S.C. § 188(c) (1970). That section provides that, in some circumstances, a lease may be reinstated if the failure to make the annual payment on time is either justifiable or not due to a lack of reasonable diligence. We have held in many cases that failure to receive a courtesy notice is not a justifiable reason for failing to make payment of annual rentals on time, e.g., Charles L. Parks, 18 IBLA 404 (1975); Charles Schutle, 15 IBLA 104 (1974). However, in this case, appellant relied on an illegible courtesy notice, and his actions demonstrate such reliance.

In Louis J. Patla, 10 IBLA 127 (1973), this Board, en banc, made the following analysis:

> Accordingly, while affirmative reliance upon erroneous data found in a courtesy notice will not result in the termination of the lease, it is clear that reliance upon the receipt of the courtesy notice can neither prevent the lease from termination by operation of law nor serve to justify a failure to timely pay the lease rental. (Emphasis added).

This case falls between reliance on "erroneous data" in a billing notice, which is exculpatory under the rule in Patla, and reliance upon "receipt" of such a notice, which is not. There was "affirmative reliance" on the content of the notice, which was illegible, but there was also reliance upon the receipt of a corrected notice or an explanation of the illegible portion of the original.

Although in appellant's letter of October 27, by which he returned the illegible notice to BLM, he referred only to his inability to read the serial number of the lease, we note that the notice was repaired by typing a line of x'es through the illegible number

and typing the number clearly beneath, and also by manually clarifying the amount due with a pen or pencil so that the sum was more legible.

We must consider the significance of the serial number in order to evaluate the reasonableness of appellant's actions. Without a legible serial number the notice does not identify the lease to which the bill refers. If, assuming that appellant could read the amount, he had simply mailed in a check without identifying the payment, he would have been doing so blindly, without knowing what account he was paying, and with no assurance that it would be properly credited. Indeed, the State Office would have been very hard put to apply it properly. The usual practice is to return unidentified payments to the sender with a request that he re-submit the payment with the correct serial number. See, e.g., Sarkeys, Inc., 77 I.D. 207 (1970).

If, on the other hand, the appellant had tried to decipher the illegible serial number but made an error, thereby sending in his check timely, but with the wrong serial number, this probably would have been regarded as due diligence, even though he would have created much more administrative confusion than he engendered by acting as he did.

We have little doubt that appellant would have made his payment on time had it not been for the fact that the notice was illegible.

We concede that appellant might have availed himself of other alternative procedures, perhaps with better success. He could, of course, have sent his check with his letter requesting clarification and the illegible notice, as the dissent suggests, assuming again that he could read the amount. Too, he could have telephoned the BLM's office in Billings, Montana, from his Los Angeles residence, and perchance obtained the desired information, although at some added expense.

It may be said that had he been more astute in his appreciation of the consequences he could have acted differently. Given the choice of alternatives, however, we do not think he was unreasonable in acting as he did. Moreover, we have not lost sight of the fact that the BLM billing was at the inception of the problem, and the Bureau's contributory involvement prevents us from treating this late payment as exclusively the fault of the lessee. For this reason we feel that lenience is indicated.

The dissenting opinion refers to the language in William L. McCullough, 18 IBLA 97, 98 (1974), which states:

> This Board has held that reliance on receipt of or information in a courtesy notice does not justify failure to make a timely payment. Louis J. Patla, 10 IBLA 127, 128 (1973). (Emphasis added.)

That statement is simply incorrect. The Board did not so hold in the Patla decision. Rather, it was noted in Patla that while prior to the 1970 amendment of sec. 31 of the Mineral Leasing Act the Department had held that reliance on terms contained in a courtesy notice did not excuse failure to pay the full amount when due, since the amendment affirmative reliance upon erroneous data in a courtesy notice will not result in termination of the lease.

The dissent cites A. O. Holley, 14 IBLA 264 (1974), as an example of "reliance" on a courtesy notice which this Board refused to treat as justification for a late payment. However, that was a case where the correct information was contained in the notice but the lessee did not take the trouble to read it carefully and misinterpreted the date because of the lack of a space between the date and the month. In Holley the appellant could have and should have read the information correctly, whereas in this case the notice was illegible.

The dissenting opinion finds that it is clear that appellant did not exercise reasonable diligence because the regulation provides that, "Reasonable diligence normally requires sending or delivering the payment in advance of the expiration date." 43 CFR 3108.2-1(c)(2). (Emphasis added). However, the circumstances of this case are not regular, ordinary or "normal." Where the lessee receives a courtesy billing notice and promptly seeks clarification from the Bureau office which issued the notice, and tenders his payment immediately upon his receipt of such clarification, we are disinclined to hold that he has not exercised "reasonable diligence."

On balance, we find that appellant acted reasonably in requesting clarification of the notice, and that he exercised due diligence with regard to the promptness in requesting such clarification and in submitting his payment after the State Office provided it.

We also note, parenthetically, that the State Office responded promptly to his inquiry but, nevertheless, mailed its reply to appellant on October 31, knowing full well that he could not receive it in time to make his payment on the due date, and that the State Office reply included an apology for the illegibility of the notice. 1/

1/ The Montana State Office returned the corrected notice to appellant with the following note:

Further, Congress made it clear that where persons rely on a faulty courtesy notice to their detriment, they should not be penalized. See 1970 United States Code Congressional and Administrative News, 3002, 3008 (1970). Therefore, where persons, such as appellant in this case, rely on an illegible billing, and where they are diligently seeking clarification on the due date, and where the payment is remitted promptly upon receipt of a corrected billing, the lease should be reinstated, all else being regular.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and remanded to the Montana State Office for action consistent with the views expressed herein.

Edward W. Stuebing
Administrative Judge

I concur in the result:

Joseph W. Goss
Administrative Judge

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fn. 1 (continued)

October 31, 1974

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Dear Mr. Steger:

Enclosed is the rental payment notice with the Serial No. M 26074 F re-typed. There is $20.00 payment due on this lease. Sorry you were unable to make out the Serial Number of the lease.

(Signature)
Accounting Clerk"

ADMINISTRATIVE JUDGE THOMPSON DISSENTING:

It is clear that there was not reasonable diligence upon the part of the lessee in transmitting his rental payment because he mailed the payment some five to six days after the due date. Reasonable diligence normally requires sending or delivering the payment in advance of the anniversary date. 43 CFR 3108.2-1(c)(2). Therefore, the only real issue here is whether the lessee's failure to send the payment on time was within the meaning of "justifiable" under section 31 of the Mineral Leasing Act, as amended by section 2 of the Act of May 12, 1970, 84 Stat. 206, 30 U.S.C. § 188(c) (1970), so as to permit reinstatement of the terminated lease.

I must disagree with the apparent conclusion of the majority that appellant was justified in this case in delaying transmittal of his payment because of the alleged illegibility of the serial number on the courtesy billing notice, and his return of the notice for correction. Other portions of the notice were clearly legible. It stated "Notice of Payment Due". It also stated:

> This is a courtesy billing notice for a rental payment due. The amount shown should be verified with the terms of the lease or other contract involved. If the amounts do not agree, the amount required by the lease or contract should be paid. If the correct amount is not paid on or before the due date, the lease or contract may terminate automatically by law.

This was sufficient to apprise the lessee that he must make a lease rental payment on time or possibly suffer the consequences of termination of the lease. There is no reason offered by appellant why he was unaware of the due date for the lease rental payment or why he did not transmit the payment when he returned the notice, and ask for the serial number to be sent to him to complete his records. His only excuse on appeal is what he calls "Bureaucratic Bungles" by the "illegible notice," and "delay in receipt of mail via the Post Office."

Because appellant received a courtesy notice, correct and legible, apparently except for the serial number of the lease, and then waited until after the due date to mail the payment upon receipt of the corrected notice, the majority apparently believes his excuse was justifiable. This Board, however, has ruled that failure to receive any courtesy notice is not a "justifiable" reason that excuses paying the annual rental for a lease on time. Louis J. Patla,

10 IBLA 127 (1973). Accord, Charles L. Parks, 18 IBLA 405 (1975); Charmaine Bowers, 16 IBLA 204 (1974); Louis H. Hughes, 16 IBLA 102 (1974); Ernst Soffer, 15 IBLA 161 (1974); Charles Schulte, 15 IBLA 104 (1974); Jan R. Christensen, 15 IBLA 72 (1974). I see less justification for the late payment of the lessee in this case where he has been put on notice generally that there is a payment due, even though all the facts may not be readily ascertainable, than where a lessee who is accustomed to receiving a notice relies upon that custom to jog his memory to pay. In the latter circumstance, the Board has consistently ruled there is no justifiable excuse. Id.

Likewise, in William L. McCullough, 18 IBLA 97 (1974), the lessee alleged reliance on a BLM courtesy notice, but stated he did not realize it pertained to the particular lease involved because the amount was for more than the sum due on the lease. The Board ruled that reliance on or receipt of information in a courtesy notice was not a justifiable excuse for the late payment.

Similarly, in A. O. Holley, 14 IBLA 264 (1974), the lessee alleged a misreading of the due date on the billing notice as "10 Oct 71", rather than as "1 Oct 71", because the date was printed "10CT71" without the usual spacing. The Board concluded that although the date was not as clear as it should be, such a slight irregularity should not result in more favorable treatment than a lessee's failure to receive any notice at all in Louis J. Patla, supra.

The underlying considerations in McCullough and Holley are more akin to those in the present case and compel a similar result than do the cases referred to in the legislative history of sections 1 and 2 of the Act of May 12, 1970, 84 Stat. 806, amending section 31 of the Mineral Leasing Act, 30 U.S.C. § 188(b) and (c) (1970).

The situation in this case is in no way comparable to the type of "billing" mistakes considered by Congress in excepting the automatic termination of a lease where a payment is deficient, but made in accordance with a lease, a bill, or decision of the Department which erred in computing the correct rental for the correct acreage. 30 U.S.C. § 188(b). The legislative history of that provision reveals some cases where such errors in acreage computations resulted in deficient payments. These would not always be readily recognizable and in some cases several years passed before the lease was held to have terminated. It is a far cry to transpose the obviously equitable circumstances of reliance on a statement in a lease approved by BLM, a BLM decision or billing notice in those circumstances to the present circumstance. To do so, we must absolve appellant completely

from any responsibility for knowing any of the terms of the lease regarding payment of rental and its due date. Congress has not done so nor has this Department. The majority's position is a great departure from the past precedents of this Board in considering the problems of when an excuse for late payment is "justifiable."

The Board early indicated that ignorance of the regulations and lease terms is not a justifiable excuse for late payment. Louis Samuel, 8 IBLA 268 (1972). In Ernst Soffer, supra, the appellant, as is appellant here, was an assignee of a portion of the acreage in the lease and had received only a copy of the approved assignment form. His excuse that he had received no notice or information concerning payment of the rental was not accepted as "justifiable." The decision pointed out he was responsible for knowing all the terms of the lease, including those regarding payments, even though he did not have a copy of the lease and had not received a courtesy billing. Likewise, in Leon Alfara Miranda, 15 IBLA 89 (1974), we have held that an appellant's unfamiliarity with the payment requirements of the lease is not a justifiable excuse. Accord, Vern H. Bolinder, 17 IBLA 9 (1974) (lack of knowledge of requirements); Schubert Byers, 17 IBLA 255 (1974) (lack of explanation on lease form of necessity for timely payment).

Furthermore, any delay in the BLM's receiving the notice returned by appellant on the 27th of October and retransmittal to him on the 31st of that month affords no basis for a justifiable excuse. A lessee's late receipt of a courtesy notice because of delay by the Post Office has not been considered a justifiable excuse. Louis H. Hughes, supra. See also Clarence Zuspann, 18 IBLA 1 (1974), where an assignee of an oil and gas lease alleged his delay in paying the rental was attributable to a delay by BLM in approving the assignment; this was not a justifiable excuse. Compare, G. Wesley Ault, 16 IBLA 291 (1974), where misplacement of the lessee's records was also not a justifiable excuse. In Ault the Board emphasized the responsibility of the lessee to maintain his own records in such a condition to insure that he promptly performs his rental payment obligations under the lease.

The majority opinion states that, "We have little doubt that appellant would have made his payment on time had it not been for the fact that the notice was illegible." I think the record shows that the major cause of his failure to make the payment on time was his lack of familiarity with the terms of his lease. In one letter to the BLM, dated November 5, 1974, he stated that he had

lost or misplaced the lease. In another letter, dated November 18, 1974, he states that oil and gas leasing is a "new procedure" to him. These statements demonstrate his lack of familiarity with the oil and gas lease requirements that I believe caused his payment to be made untimely.

In short, unless we overrule the underlying rationale in all of the cases cited above that it is the lessee's responsibility to know the requirements and to make his payments on time and except for exceptional circumstances normally beyond his control he is not justified when he fails to do so, I cannot see how we can find appellant's delay in paying the rental in this case "justifiable" so as to permit reinstatement of his lease.

To suggest that the circumstance in this case somehow makes appellant's actions an exercise of "reasonable diligence" is to ignore the rationale of regulation 43 CFR 3108.2-1(c)(2), and cases applying that regulation and the relationship of the "justifiable" test. I cannot subscribe to such an erosion of meaning simply because BLM sent a notice which was not completely legible. The responsibility remained with the lessee to make the payment timely.

Joan B. Thompson
Administrative Judge